IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 325

LOUIS A. NEGRE,

v.

STANLEY R. LARSEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

OPENING BRIEF FOR LOUIS A. NEGRE, *Petitioner*

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STATEMENT OF THE CASE

The following facts in Negre's application and found by the Army hearing officer are undisputed:

Louis A. Negre was born in Nice, France, in July 1947. Both of his parents were Roman Catholic and he was raised in that religion. (R.2)

The family immigrated to the United States in 1951 and resided in Bakersfield from that time to the present. (R.1)

Negre attended St. Francis Catholic School from grades 1-5, Our Lady of Perpetual Help School from grades 6-7 and Garces Roman Catholic High School from grades 8-12. (R.1)

He attended Bakersfield Junior College from 1965 to June 1967.

He was classified 1-A and submitted to induction on August 29, 1967. He received combat infantry training at Fort Lewis, Washington, and advanced infantry training at Fort Polk, Louisiana. He was thereupon ordered to report for duty in Vietnam as a combat infrantryman. (R.11)

Negre applied for discharge as a conscientious objector on February 26, 1968. The application was denied, Negre was ordered to proceed for shipment to Vietnam, refused, was tried by general court-martial for disobedience of orders and was acquitted. (R. 4, 43)

Thereupon, Negre filed further application for discharge as a conscientious objector, subject of the present action, upon January 27, 1969. (R.1-36)

The application stated in part:

> "It was there, upon completion of that training, that I knew that if I would permit myself to go to Vietnam I would be violating my own concepts of natural law and would be going against all that I had been taught in my religious training. To contribute to the war in Vietnam would be in contravention of my own conscience and my moral beliefs. For one must nor [sic] forget the purpose for which we as men were put on earth. That purpose was to please God, or Creator, for at the end of the world one is unable to bring with him the material things which he has accumulated while on earth. It is on that day that judgment will be passed on every man on the manner he served God and followed his conscience, given by God." (R.11-12)

Negre set out at length the excerpts from the pastoral letter "Human Life in Our Day" issued by the National

Conference of Catholic Bishops on November 15, 1968, including the following:

> " 'As witness to a spiritual tradition which accepts enlightened conscience even when honestly mistaken, as the immediate arbiter of moral decisions, we can only feel reassured by this evidence of individual responsibility and the decline of uncritical conformism.' "
>
> " 'We therefore join with the Council Fathers in praising 'those who renounce the use of violence in the vindication of their rights and who resort to methods of defense which are otherwise available to weaker parties, provided that this can be done without injury to the rights and duties of others or of the community itself.' "
>
> " 'Whether or not such modifications in our laws are in fact made, we continue to hope that, in the all-important issues of war and peace, all men will continue to follow their consciences. We can do no better than to recall, as did the Vatican Council, "the permanent binding force or universal natural law and its all embracing principles, "to which "man's conscience itself gives ever more emphatic voice." ' " (R.5)

Negre also quoted in support of his application passages from Scripture, the Act of Contrition, Vatican II, Pope John XXIII, Pope Paul VI, Cardinal Ottaviani and the American bishops. (R. 5-10).

The passages set out in Negre's application established his religious duty to refuse military service which he had been ordered to render because such service would violate his conscience formed in accordance with his Catholic religious training and belief.

Attached to his application was the recommendation of the Catholic chaplain, the Reverend (Lt. Col.) Charles J. Richard:

> "I feel on this basis the man is sincere in his intention and his beliefs should be honored." (R. 34)

Also attached to his application was a letter of another Catholic priest, the Reverend James E. Straukamp, S.J. Father Straukamp wrote:

> "I counseled Private Negre that under the beliefs and teaching of the Catholic Church he is obliged to examine and form his own conscience in respect to participating or refusing to participate in the war at this time. This obligation is clear from the Scriptures, and has been explicated many times by the Fathers and Doctors of the Church, and recently both by Pope John XXIII and Pope Paul VI in section 16 of the Pastoral Constitution: [thereafter quoted by Father Straukamp].
>
> * * *
>
> "It is my conclusion based upon the interview and the foregoing that Private Negre is in sincere conscience opposed to participation in any form in the war at this time, and therefore is obliged by his religious training and belief to follow his conscience in this matter." (R. 27-28)

A hearing was held before Ronald K. Van Wert, Captain, JAGC, an attorney, who reported and recommended as follows:

> "b. The applicant was educated in Catholic schools through the 12th grade. He also received two years of education at Bakersfield Junior College, Bakersfield, California. His religious training has been extensive and he is extremely devout. His sincerity is shown by his willingness to be incarcerated for his beliefs. The roots of his beliefs are religious. The real question in this case is what are those beliefs. It is not that the beliefs are not based on religious grounds."
>
> "c. The applicant believes, in line with the dictates of the Catholic Church, that his conscience must be his guide. This is true even if his conscience is erroneous as long as it is a 'certain conscience.' As stated in *Right and Reason, Ethics in Theory and Practice*, by Austin Fagothey.

'. . . conscience is a subjective guide to conduct, that invincible error and ignorance are unavoidable, that any wrong which occurs is not done voluntarily and hence is not chargeable to the agent . . . . . The person is free of moral responsibility by the invincible ignorance bound up in his error.' (38 Right and Reason)

The Church recognizes that PFC Negre may be objectively in error, but since he subjectively believes his decision to be correct, he must at all costs follow that belief. According to the author, Austin Fagothey, "one must never do an act that is intrinsically wrong, no matter what the penalty.' (id. at Civil Law 347). The applicant sincerely believes that the war in Viet Nam is wrong and that his failure to object to serving in Viet Nam is in violation of his religious beliefs."

"d. Private First Class Negre makes constant reference in his written applications to the "Viet Nam" situation. He stated in his 15 July 1968 application, 'I am obligated by my conscience, under my religious training and belief, to refuse participation in any form in the war in Viet Nam.' He disagrees with the philosophy that the United States is trying to help the Vietnamese people. He states in the same application, 'I personally cannot believe that by being in Viet Nam we are helping the people there as we say.' He is overly concerned with the type of war, not war itself. He is sincerely opposed to violence but it seems that he can in good conscience accept some 'types' of war. He states that he accepts the 'teachings of his Holiness Pope Paul VI as announced in the Pastoral Constitution as binding upon my conscience . . . .' (p. 5 of 15 July 1968 application). Pope Paul is also concerned with the 'type' of war. In his statement in the Pastoral Constitution on the Church in the Modern World (7 December 1968), Pope Paul stated:

> 'But it is one thing to undertake military action for the just defense of the people, and something else again to seek the subjugation of other nations . . . .
>
> Any act of war aimed indiscriminately at the destruction of an entire city or of extensive areas along with their population is a crime against God and man himself . . . .'
>
> The war that concerned the Pope was a war of aggression rather than one of defense. He felt that the destruction of cities was a crime against God if it would serve no purpose. The war effort must not be indiscriminate. Pope Paul did not pass on the morality of a defensive war or the indiscriminate bombing of military targets."
>
> * * *
>
> "f. It cannot be doubted that PFC Negre is opposed to killing if he has to be directly involved in it. * * * the real basis for my recommending rejection of the application is that, in my opinion, the applicant is objecting to a particular war, para 3b4, AR 635-20. * * *"
>
> "3. It is my opinion that PFC Negre is conscientiously opposed to the use of force if that force has to be asserted by him. He is not conscientiously opposed to all types of war." (R. 37-40)

The Department of the Army disapproved Negre's application for discharge:

> "* * * Applicant's objection to service based upon a personal moral code which causes him to object to the war in Vietnam specifically and which disqualified him for separation on the grounds of conscientious objection." (R. 41)

Negre was again ordered to service in Vietnam and filed his petition for habeas corpus on February 14, 1969. (R. 42-46)

The court below denied the petition on the ground that recommendation of the hearing officer and decision of the Department of the Army on the ground that

"While petitioner's frequent references to the war in Vietnam and his vigorous opposition thereto and condemnation thereof are compatible with a conscientious objection to all war by religious training and belief, and not necessarily the expression of 'a personal moral code', nevertheless, it is a fact which, when considered together with other facts disclosed in the record, including the timing of the application and petitioner's request for non-combatant status with the restriction that he be assigned to duties in the United States, could sustain the opinion of the hearing officer and the decision of the Army. It therefore cannot be said that the decision of the Army is without a basis in fact in support thereof." (R. 48)

Negre appealed to the United States Court of Appeals for the Ninth Circuit which affirmed. (R. 50) The Supreme Court granted certiorari on June 29, 1970. (R. 53)

JURISDICTION

Negre petitioned for a writ of habeas corpus in the district court below. Jurisdiction exists in the district court to issue writs of habeas corpus under 28 U.S.C §§ 2241, et seq. The courts of appeals of eight circuits have now affirmed habeas corpus as the remedy for discharge from the armed services of conscientious objectors. *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968); *Bates v. Commander, First Coast Guard Dist.*, 413 F.2d 475 (1st Cir. 1969); *Brown v. McNamara*, 387 F.2d 150 (3d Cir. 1967), cert. denied, 390 U.S. 1005 (1968); *United States ex rel Brooks v. Clifford*, 409 F.2d 700 (4th Cir. 1969); *Brown v. Resor*, 407 F.2d 281 (5th Cir. 1969); *Packard v. Rollins*, 422 F.2d 525 (8th Cir. 1970); *Sertic v. Laird*, 418 F.2d 915 (9th Cir. 1969); *United States v. O'Malley*, 420 F.2d 1344 (D. C. Cir. 1969). Indeed, habeas corpus has been the traditional remedy for assertion of conscientious objection and quite possibly may not be constitutionally suspended. See *Oestereich v. Selective Service Board No. 11*, 393 U.S. 233 at

239 (1968); also see *Witmer v. United States*, 348 U.S. 375 at 377 (1955).

The Tenth Circuit originally refused habeas corpus until supposed in-service remedies had been exhausted. *Noyd v. McNamara*, 378 F.2d 538 (10th Cir.) cert. denied 389 U.S. 1022 (1967).

However, in *Craycroft v. Ferrall*, ____ U.S. ____ 25 L.Ed.2d 351 (1970) and *Bratcher v. Laird*, 397 U.S. 246 25 L.Ed.2d 281 (1970) the Solicitor General conceded that administrative remedies within the armed services had been exhausted or were non-existent. The Supreme Court remanded those cases for further consideration in view of the Solicitor General's concession. The present case does not involve a military court-martial, and the Court of Military Appeals is therefore without jurisdiction. 10 U.S.C. § 867. 28 U.S.C. § 1651 gives courts jurisdiction to issue writs only in support of their jurisdiction. Thus, in the present case, Negre had no remedy with the Court of Military Appeals and properly sought relief from the District Court instead.

QUESTIONS PRESENTED AND SUMMARY OF ARGUMENT

1. The conduct of the Catholic refusing military service pursuant to conscience formed under his religious training and belief is identical with the conduct of a member of a traditional pacifist sect refusing such service. Does it violate freedom of religion and the rule against establishment of religion and deny due process and equal protection of law to compel service of the Catholic or subject him to punishment solely because the statement of Catholic religious doctrine on war differs from the statement of traditional pacifist theological teaching on war?

The Army hearing officer herein conceded that Catholic religious doctrine prohibited Negre from performing military service then and there if he believed such service to violate conscience. (R. 38)

But the government contends that the Catholic may be punished or excluded from exemption from military service accorded members of traditional pacifist sects because Catholic doctrine would allow the same individual to participate in another, hypothetical war, at another hypothetical time and place, provided that the Catholic—contrary to the fact in the actual case—did not find service in such hypothetical war to violate conscience.

Appellant in this brief contends that disability or punishment for religious doctrine is prohibited by freedom of religion and the rule against establishment of religion under the First Amendment, and by due process and equal protection of law under the Fifth Amendment to the Constitution.

2. In view of the uniform expression of intent by Congress to respect religious conscientious objection to bearing arms as a legitimate expression of the belief "We ought to obey God rather than men", will section 6(j) of the Selective Service Act bear the construction that obedience to God by Catholics in refusing military service pursuant to conscience is to be punished, whereas obedience to God by members of traditional pacifist sects is to be recognized, merely because the statement of Catholic doctrine seeks to distinguish between just and unjust wars, though the Catholic doctrine of duty to follow conscience is as clear as that of the traditional pacifist sects?

Petitioner in this brief contends that the government's construction of section 6(j) herein to discriminate against Catholics is contrary to the uniformly expressed intent of Congress to subordinate the state's demand for military service of its citizens to a respect for conscientious objection expressing obedience to the commands of God as understood by the individual under his religious training and belief.

STATUTE INVOLVED

Section 6(j) of the Military Selective Service Act of 1967, 50 U.S.C. App. § 456(j) provides in pertinent part:

> "(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological or philosophical views, or a merely personal moral code."

ARGUMENT

1. IT VIOLATES FREEDOM OF RELIGION, THE RULE AGAINST ESTABLISHMENT OF RELIGION, DUE PROCESS AND EQUAL PROTECTION TO SUBJECT A CATHOLIC–PROHIBITED BY HIS RELIGION AND CONSCIENCE FROM MILITARY SERVICE–TO DISABILITY OR PUNISHMENT UNLESS HE ABANDONS ONE OF THE PRECEPTS OF HIS OWN RELIGION AND PROFESSES A BELIEF IN THE DOCTRINES OF A TRADITIONAL PEACE SECT

The denial of discharge to Negre in the present case violates the First and Fifth Amendments as interpreted in *United States v. Seeger*, 380 U.S. 163 (1965) and in *Sherbert v. Verner*, 374 U.S. 398 (1963). The Army hearing officer described Negre:

> " * * * His religious training has been extensive and he is extremely devout. His sincerity is shown by his willingness to be incarcerated for his beliefs. The roots of his beliefs are religious. The real question in this case is what are those beliefs. It is not that the beliefs are not based upon religious grounds." (R. 37)

Finding Negre's beliefs to be religious and sincerely held, the Army hearing officer next made a careful analysis of Catholic religious training and belief:

> "c. The applicant believes, in line with the dictates of the Catholic Church, that his conscience must be his guide. This is true even if his conscience is erroneous as long as it is a 'certain conscience.' * * * The Church recognizes that PFC Negre may be objectively in error, but since he subjectively believes his decision to be correct, he must at all costs follow that belief." (R. 37-38)

After his careful summary of Catholic doctrine and finding that the Catholic doctrine of conscience prohibited Negre to perform military service which violated his conscience, the Army hearing officer next turned to an examination of the Catholic teaching in respect to war:

> "* * * [Negre] is sincerely opposed to violence but it seems that he can in good conscience accept some 'types' of war. He states that he accepts the 'teachings of his Holiness Pope Paul VI as announced in the Pastoral Constitution as binding upon my conscience . . . .' (p. 5 of 15 July 1968 application). Pope Paul is also concerned with the 'type' of war. In his statement in the Pastoral Constitution on the Church in the Modern World (7 December 1968), Pope Paul stated:
>
> 'But it is one thing to undertake military action for the just defense of the people, and something else again to seek the subjugation of other nations . . . .
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> Any act of war aimed indiscriminately at the destruction of an entire city or of extensive areas along with their population is a crime against God and man himself . . . .'
>
> "The war that concerned the Pope was a war of aggression rather than one of defense. He felt that the destruction of cities was a crime against God if it would serve no purpose. The war effort must not be indiscriminate. Pope Paul did not pass on the

> morality of a defensive war or the indiscriminate bombing of military targets." (R. 38-39)

The Army hearing officer correctly found that Negre's religious training and belief prohibited Negre from performing the military service in Vietnam that Negre had been ordered to perform.

Congress in Section 6(j) of the Military Selective Service Act of 1967 has exempted religious conscientious objectors from military service, and the Army in Regulation 635-20 has directed the release from military service of religious conscientious objectors. Accordingly, the Constitution as interpreted in *United States v. Seeger*, 380 U.S. 163 (1965) put an end to the governmental inquiry at the point of finding Negre to be a religious conscientious objector and prohibited the Army hearing officer, the Army, and the courts from subjecting Negre to a disability because of the particular phraseology or statement of doctrine by Negre's religion as contrasted to the statement or doctrine of other religions such as those of the traditional pacifist sects.

The Supreme Court pointed the way for the government to stay free of theological controversy by adopting an objective test in *United States v. Seeger*, 380 U.S. 163 (1965):

> "We believe that under this construction, the test of belief 'in relation to a Supreme Being' is whether a given belief that is sincere and meaningful in the life of its possessor is parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in relation to a Supreme Being' and the other is not." 380 U.S. at 165-166.

Continuing, the court points out:

> "While the applicant's words may differ, the test is simple of application. It is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?

"Moreover, it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight.

* * *

"The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government. * * * Local boards and courts in this sense are not free to reject beliefs because they consider them 'incomprehensible.' Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." 380 U.S. 163 at 184-185.

Indeed, Negre falls squarely under the holding of *Sherbert v. Verner*, 374 U.S. 398 at 404 (1963):

"Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."

Mrs. Sherbert, a Seventh Day Adventist, was denied employment compensation because—pursuant to her religious view of the Sabbath—she refused to work on Saturday. The court held the denial of the benefit of unemployment compensation to Mrs. Sherbert by the state to be unconstitutional because there was no compelling state interest to justify the infringement upon her religious freedom.

Mrs. Sherbert could have become eligible for unemployment compensation merely by abandoning the Seventh Day Adventist view that the Sabbath fell on Saturday and adopting the orthodox Christian teaching that the Sabbath falls on Sunday. If she so changed her views, Mrs. Sherbert would be free to work on Saturday, to refuse to work on Sunday and to collect unemployment compensation if she could not find work if she refused Sunday work.

In the passage set out above the Supreme Court held that it was unconstitutional to compel the citizen to abandon one of the precepts of her religion on the one hand or to forego the governmental benefit of unemployment compensation on the other hand. The court declared:

> "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such, *Cantwell v. Connecticut*, 310 U.S. 296, 303. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U.S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island*, 345 U.S. 67; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania*, 319 U.S. 105; *Follett v. McCormick*, 321 U.S. 573; cf. *Grosjean v. American Press Co.*, 297 U.S. 233."

As noted by Judge Zirpoli in *United States v. McFadden* 309 F.Supp. 502 at 506 (N.D. Cal. 1970) (appeal pending, No. 422, Oct. Term 1970):

> "In the case before the court the statute forces [the Catholic] to choose between following the precepts of his religion and going to jail or abandoning those precepts in order to avoid jail. Indeed, the case of [the Catholic objector] is stronger than Sherbert's, for not only is he faced with jail, but if he abandons his conscience he will be put in the position of possibly violating the fundamental precept of his religious belief—the killing of another human being in the cause of an unjust war.

> "Such a burden upon the exercise of one's religion can have no place in a society built by men and women of all religions and persuasions. And although our history is not free from religious intolerance and persecution, it has always been the ideal of our forefathers to create a country where, as George Washington said: '[t]he liberty enjoyed by the people of these States of worshipping Almighty God agreeably to their consciences, is not only among the choicest of their blessings, but also of their rights.' "

We may remark, in fact, that the discrimination against the Catholic conscientious objector is less justifiable than the discrimination in *Sherbert v. Verner.* At least Mrs. Sherbert was denied a governmental benefit for conduct –she refused to work on Saturdays and all others who could not obtain employment for refusal to work on Saturdays were likewise denied unemployment compensation.

By contrast, the *conduct* of the Catholic objector in refusing military service obedient to conscience under his religion is identical with the *conduct* of the member of a traditional pacifist sect refusing military service at the same place and date. The government admits that a member of a traditional pacifist sect would be entitled to discharge from military service upon a finding that his beliefs were sincerely held and religious so long as the individual subscribed to the statement of doctrine traditionally affirmed by members of such traditional pacifist sect.

Thus, the government in the present case seeks to deny Negre the benefit of discharge from military service not because of Negre's conduct, but solely because Negre will not surrender his belief: Namely, his belief that the Catholic statement of theology in respect of war is correct. The Government demands that Negre to qualify for discharge adopt the belief that the statement of theology of some traditional pacifist sect in respect of war is correct. Correspondingly, the Government demands that Negre admit that Catholic teaching in respect of service in war is erroneous.

What the First and Fifth Amendments prohibit as a minimum is imposing punishment or disability upon an individual not by reason of his conduct but by reason of the statement of religious doctrine or belief to which he subscribes. In a leading case on establishment of religion the Supreme Court declared:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. * * *" *Everson v. Board of Education*, 330 U.S. 1 at 15-16 (1947).

As Judge Weigel held in *United States v. Bowen*, ____ F. Supp. ____, 2 S.S.L.R. 3421 (N.D. Cal. 1969):

> "The Supreme Court has recently declared the meaning of this central principle of separation of church and state as follows:
>
> > 'Government in our democracy, state and national, must be *neutral in matters of religious theory*, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion and *it may not aid, foster, or promote one religion or religious theory against another* or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion and between religion and nonreligion.' *Epperson v. Arkansas*, 393 U.S. 97, 103-4 (1968) (emphasis added).
>
> "In denying conscientious objector status to Bowen based upon his religious opposition to the Vietnam War but permitting it to one whose religious opposition is to all wars, the effect of Section 6(j) is to

breach the neutrality between religion and religion required by the mandate of the First Amendment."

Sherbert v. Verner, 374 U.S. 398 at 402 (1963) noted and followed a number of Supreme Court decisions that the government was prohibited from regulating religious beliefs as such or penalizing or discriminating against individuals or groups because of the religious beliefs and doctrines held by them:

> "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such, *Cantwell v. Connecticut*, 310 U.S. 296, 303. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U.S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island*, 345 U.S. 67; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania*, 319 U.S. 105; *Follett v. McCormick*, 321 U.S. 573; cf. *Grosjean v. American Press Co.*, 297 U.S. 233."

Many of the founding fathers came from European states in which the government barred from office, subjected to other disability or punished men for the practice of or even the belief in a religion other than the state-established religion. Belief in the Catholic religion was at one time high treason under the laws of Great Britain.

Against this background, the Supreme Court declared in *Board of Education v. Barnette*, 319 U.S. 624 at 641-42 (1943):

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Thus, under our system of government, as long as the conduct of the Catholic conforms to the norm of conduct

prescribed by Congress for members of the traditional pacifist sects, there can be no compelling state interest in denying the Catholic discharge from military service or punishing the Catholic for refusing military service in circumstances when an individual affirming traditional pacifist theology and doctrine would be discharged from military service. To the foregoing cases that the Constitution prohibits punishment of individuals for doctrine, we may add simply by citation the following:

Abington School District v. Schempp, 374 U.S. 203 at 214-215 (1963);

Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 at 119, 122 (1952);

cf. *Braunfeld v. Brown*, 366 U.S. 599 at 603-607 (1961).

For the reasons stated, section 6(j) of the Military Selective Service Act of 1967, Department of Defense Directive 1300.6, and Army Regulation 635-20 are unconstitutional and void to the extent that they disable Negre from discharge from military service or subject him to punishment because the doctrinal statements of his Catholic religion do not conform to the doctrinal statements of traditional peace sects.

As eloquently stated by Judge Zirpoli in striking down section 6(j) as unconstitutional in *United States v. McFadden*, 309 F.Supp. 502 at 506 (N.D. Cal. 1970) (appeal pending, No. 422, October Term):

> "In the case before the court the statute forces [the Catholic] to choose between following the precepts of his religion and going to jail or abandoning those precepts in order to avoid jail. Indeed, the case of [the Catholic objector] is stronger than Sherbert's, for not only is he faced with jail, but if he abandons his conscience he will be put in the position of possibly violating the fundamental precept of his religious belief—the killing of another human being in the cause of an unjust war.

"Such a burden upon the exercise of one's religion can have no place in a society built by men and women of all religions and persuasions. And although our history is not free from religious intolerance and persecution, it has always been the ideal of our forefathers to create a country where, as George Washington said: '[t] he liberty enjoyed by the people of these States of worshipping Almighty God agreeably to their consciences, is not only among the choicest of their blessings, but also of their rights.' "

2. THE DISCRIMINATION BASED UPON RELIGIOUS DOCTRINE WHICH THE GOVERNMENT SEEKS TO READ INTO SECTION 6(j) OF THE SELECTIVE SERVICE ACT IS CONTRARY TO THE PRIOR CONSTRUCTION OF THE STATUTE AS WELL AS CONTRARY TO THE LEGISLATIVE INTENT, UNIFORMLY EXPRESSED FROM THE EARLIEST TIMES IN THE UNITED STATES, TO RESPECT THE RELIGIOUS PROPOSITION "WE OUGHT TO OBEY GOD RATHER THAN MEN."

The legislative history of section 6(j) of the current Selective Service Act demonstrates that it stems from a paraphrase of the dissent of Chief Justice Hughes in *United States v. Macintosh*, 283 U.S. 605 at 633 (1931):

". . . in the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." (Emphasis added).

Section 6(j) of the Selective Service At of 1948 provided:

"(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious

training and belief, is conscientiously opposed to participation in war in any form. *Religious* training and belief in this connection means an individual's *belief in a relation to a Supreme Being involving duties superior to those arising from any human relation*, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." (Emphasis added).

Senate Report 1268, 80th Cong. 2d Sess. 1989, 2002 (1948) states:

> "This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See *United States v. Berman*, 156 F.2d 377, certiorari denied, 329 U.S. 795)."

United States v. Berman, 156 F.2d 377 at 381 (9th cir. 1946) quoted the identical passage from *United States v. Macintosh* which was adopted by Congress in the 1948 Act. Indeed, *Berman* emphasized the intent of Congress to exempt men refusing military service obedient to their understanding of religious command, as opposed to pholosophical, social or political policy not expressing the command of God, a Supreme Being, or a power higher than the state.

It should next be noted that the opinion of Chief Justice Hughes in *United States v. Macintosh*, adopted by the Congressional paraphrase quoted, involved specifically a selective or just war conscientious objector:

> ". . . he explained that he was not willing 'to promise beforehand' to take up arms, 'without knowing the cause for which my country may go to war' and that 'he would have to believe that the war was morally justified.' He declared that 'his first allegiance was to the will of God;' that he was ready to give to the United States 'all the allegiance

he ever had given or ever could give to any country, but that he could not put allegiance to the government of any country before allegiance to the will of God.' " 283 U.S. at 631.

The opinion of Chief Justice Hughes, adopted by paraphrase in the 1948 Selective Service Act, is worth quoting at length because he correctly outlines the uniform intention of Congress from the earliest days of the union to recognize religious training and belief and to refrain from imposing any religious test as a condition of disability or benefit imposed by the government.

> "It goes without saying that it was not the intention of the Congress in framing the oath to impose any religious test. When we consider the history of the struggle for religious liberty, the large number of citizens of our country from the very beginning, who have been unwilling to sacrifice their religious convictions, and in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be their allegiance to the will of God, I find it impossible to conclude that such persons are to be deemed disqualified for public office in this country because of the requirement of the oath which must be taken before they enter upon their duties.
>
> * * *
>
> But the long-established practice of excusing from military service those whose religious convictions oppose it confirms the view that the Congress in the terms of the oath did not intend to require a promise to give such service. The policy of granting exemptions in such cases has been followed from colonial times and is abundantly shown by the provisions of colonial and state statutes, of state constitutions, and of acts of Congress. See citations in the opinion of the circuit court of appeals in the present case. 42 F.(2d) 845, 847, 848. The first constitution of New York, adopted in 1777, in providing for the state militia, while strongly emphasizing the duty of defense, added 'that all such of the inhabi-

> tants of this state (being of the people called Quakers) as, from scruples of conscience may be averse to the bearing of arms, be therefrom excused by the legislature, and do pay to the state such sums of money, in lieu of their personal service, as the same may, in the judgment of the legislature, be worth.' Art. 40. A large number of similar provisions are found in other States. The importance of giving immunity to those having conscientious scruples against bearing arms has been emphasized in debates in Congress repeatedly from the very beginning of our government, and religious scruples have been recognized in draft acts. Annals of Congress (Gales), 1st Congress, vol. 1, pp. 434, 436, 729, 731; vol. 2, pp. 1818-1827; Acts of February 24, 1864, 13 Stat. at L. 6, 9, chap. 13; January 21, 1903, 32 Stat. at L. 775, chap. 196; June 3, 1916, 39 Stat. at L. 166, 197, chap. 134; May 18, 1917, 40 Stat. at L. 76, 78, chap. 15." 283 U.S. at 631-633.

Continuing, Chief Justice Hughes emphasized the recognition uniformly extended by Congress to religious scruple against bearing arms upon the grounds of higher duty in conscience to God:

> "As was stated by Mr. Justice Field, in *Davis v. Beason*, 133 U.S. 333, 342, 33 L.ed. 637, 639, 10 S.Ct. 299, 8 Am. Crim. Rep. 89: "The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.' One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God. Professor Macintosh, when pressed by the inquiries put to him, stated what is axiomatic in religious doctrine. And, putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to

religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience. There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts. The Congress has sought to avoid such conflicts in this country by respecting our happy tradition. In no sphere of legislation has the intention to prevent such clashes been more conspicuous than in relation to the bearing of arms. It would require strong evidence that the Congress intended a reversal of its policy in prescribing the general terms of the naturalization oath. I find no such evidence." 283 U.S. at 634-635.

Finally, Chief Justice Hughes squarely addressed the question of selective conscientious objection, or objection only to bearing arms in wars found to be unjust under religious training and belief:

> "Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression. If, while recognizing the power

> of Congress, the mere holding of religious or conscientious scruples against all wars should not disqualify a citizen from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship, there would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification." 283 U.S. at 635.

We note with interest that Solicitor General Cox in briefing *United States v. Seeger* declared at p. 35 (reproduced as p. 20A in *Welsh v. United States*, No. 76, Oct. Term 1969):

> "The core of the exemption for conscientious objectors is the unwillingness of the Congress, speaking the true will of the American people, to punish as a criminal a man who refuses to perform military service in obedience to what he believes is the command of a God transmitted by divine revelation. The unwillingness of the American people to compel a man to disobey a divine command and yield to a human obligation imposed by government is older than the Nation."

The Solicitor General then devoted pages 41-72 of the *Seeger* brief (26A-57A of the *Welsh* appendix) to a careful history of the uniform and unbroken Congressional history of intent to respect refusal of military service when it is based upon obedience by the individual to the commands or laws of God as he understands them under his religion. This history set out, moreover, is largely taken from *Selective Service System Monograph No. 11, Conscientious Objection* (1950) which likewise recognizes the Congressional intent to permit men in respect of military service to follow the commands of conscience as duty to God, a duty higher than duty to the state.

In his second report as Director of Selective Service to the President, Lewis B. Hershey stated:

" . . . it is part of our great tradition of freedom to recognize the fact of conscientious objection, even though it seems contrary to the national interest at the moment and is, to most Americans, a tragic misinterpretation of contemporary events. We recognize at the basis of conscientious objection, the very simple statement of the New Testament: 'It is better to obey God rather than man.' It might be invincible ignorance or misunderstanding or emotion, but if the individual regards his acts as his answer to a call from God or as God's will, in accordance with his religious training and belief, then the Nation, in accordance with its tradition, feels bound to recognize it.

* * *

"The officers who had charge of the Presidential appeals thus summarized their experience during the year:

The appeals of conscientious objectors have presented some of the most troublesome as well as the most interesting questions. Here divergent ideas broke sharply over that rock of contention presented by the congressional language 'religious training and belief'. Local boards and boards of appeal generally brought little sympathy to the consideration of these cases. The tendency was to insist that conscientious objections be based upon certain kinds of religious experience. Many board members held the view that such objection must arise from religious training and belief in those particular religious organizations which make objection to war a definite part of their creed. It was argued, for example, that a member of the Catholic church could not possibly have a basis for conscientious objections.

Hearing officers of the Department of Justice took a somewhat broader but still limited view in their early reports. They held generally that the conviction, while limited to no particular creed, must nevertheless rest upon an easily recognizable religious background with the definition of religion the usual comewhat formal concept.

> After much consideration we adopted a more liberal view, based upon a conclusion that the definitions of religion and the variety of religious experience are so nearly infinite in number as to make futile any attempt to say whether this or that one met the law. The practical effect of this decision was to say that conscientious convictions held by a man reared in the environment of a religious civilization and exposed, if only subjectively, to its ethical concepts, have their their [sic] roots in the same soil from which spring religious convictions, and furnish evidence from which may be drawn the inference that he recognizes a Diety or a power above and beyond the human. This view has prevailed." Selective Service in Wartime, Second Report of the Director of Selective Service, 1941-42 256, 258 (April 3, 1943).

The Supreme Court has repeatedly acknowledged the recognition of religious belief uniformly expressed under our Constitution:

Girouard v. United States, 328 U.S. 61 (1946) adopted Chief Justice Hughes' dissent in *Macintosh* as the correct view of the intent of Congress in the immigration law. The court declared:

> "The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle." 328 U.S. at 68.

Zorach v. Clauson, 343 U.S. 306 at 313-314 (1952) declared:

> " "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom

to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. * * * When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. * * * The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction,"

Mr. Justice Goldberg, joined by Mr. Justice Harlan concurred in *Abington School District v. Schempp*, 374 U.S. 203 at 306 (1963):

> "Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existance of religion and, indeed, under certain circumstances the First Amendment may require it to do so. * * * [T]he required and the permissible accommodations between state and church frame the relation as one free from hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other."

In *United States v. Seeger*, 380 U.S. 163 at 169-170 (1965) held:

> "Chief Justice Hughes, in his opinion in *United States v. Macintosh*, 283 U.S. 605, 75 L.ed. 1302, 51 S.Ct. 570 (1931) enunciated the rationale behind the long recognition of conscientious objection to participation in war accorded by Congress in our various conscription laws when he declared that 'in

the forum of conscience, duty to a moral power higher than the State has always been maintained.' At 633, 75 L.ed. at 1315 (dissenting opinion). In a similar vien Harlan Fiske Stone, later Chief Justice, drew from the Nation's past when he declared that 'both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.' Stone, The Conscientious Objector, 21 Col. Univ. A 253, 269 (1919).

"Governmental recognition of the moral dilemma posed for persons of certain religious faiths by the call to arms came early in the history of this country. Various methods of ameliorating their difficulty were adopted by the Colonies, and were later perpetuated in state statutes and constitutions. Thus by the time of the Civil War there existed a state pattern of exempting conscientious objectors on religious grounds." 380 U.S. at 169-170

Whatever may be the limits of Constitutional and Congressional recognition of non-religious conscientious objection, all justices of the Supreme Court found common ground in *Welsh v. United States*, ٣٩٨ U.S. ..., 38 L.W. 4486 (1970), that Congress intended to exempt from military service men who objected based upon their religious training and belief.

Mr. Justice Harlan concurring in the result on constitutional grounds stated.

"The policy of exempting religious conscientious objectors is one of long-standing tradition in this country and accords recognition to what is, in a diverse and 'open' society, the important value of reconciling individuality of belief with practical exigencies whenever possible. See *Girouard v. United States*, 328 U.S. 61 (1946). It dates back to colonial times and has been perpetuated in state and federal conscription statutes. See Mr. Justice Cardozo's separate opinion in *Hamilton v. Bd. of Regents, Supra*, 293 U.S., at 267; *United States v. Macintosh*, 42 F.2d 845, 847. That it has been phrased in religious terms reflects, I assume, the fact that ethics and morals, while the concern of secular philosophy, have traditionally been matters taught by organized religion and that for most individuals spiritual and ethical nourishment is derived from that source. It further reflects, I would suppose, the assumption that beliefs emanating from a religious source are probably held with great intensity." 38 L.W. at 4496.

Mr. Justice White in his dissent, joined by the Chief Justice and Mr. Justice Stewart noted:

"Congress may have granted the exemption because otherwise religious objectors would be forced into conduct which their religions forbid and because in the view of Congress to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect.

* * *

"Legislative exemptions for those with religious convictions against war date from colonial days. As Chief Justice Hughes explained in his dissent in *United States v. Macintosh*, supra, at 633, the importance of giving immunity to those having conscientious scruples against bearing arms has consistently been emphasized in debates in Congress and such draft exemptions are 'indicative of the actual operation of the principles of the Constitution.' However, this Court might construe the First Amendment, Congress has regularly steered clear of

free exercise problems by granting exemptions to those who conscientiously oppose war on religious grounds.

"If there were no statutory exemption for religious objectors to war and failure to provide it was held by this Court to impair the free exercise of religion contrary to the First Amendment, an exemption reflecting this constitutional command would be no more an establishment of religion than the exemption required for Sabbatarians in *Sherbert v. Verner*, 375 U.S. 398 (1963), or the exemption from the flat tax on book sellers held required for evangelists, *Follett v. McCormick*, 321 U.S. 573 (1944). Surely a statutory exemption for religionists required by the Free Exercise Clause is not an invalid establishment because it fails to include nonreligious believers as well; nor would it be any less an establishment if camouflaged by granting additional exemptions for nonreligious, but 'moral' objectors to war.

"On the assumption, however, that the Free Exercise Clause of the First Amendment does not by its own force require exempting devout objectors from military service, it does not follow that § 6(j) is a law respecting an establishment of religion within the meaning of the First Amendment. It is very likely that § 6(j) is a recognition by Congress of free exercise values and its view of desirable or required policy in implementing the Free Exercise Clause. That judgment is entitled to respect. Congress has the power 'to raise and support armies' and ' to make all laws which shall be necessary and proper for carrying into execution' that power. Art. I, § 8. The power to raise armies must be exercised consistently with the First Amendment which, among other things, forbids laws prohibiting the free exercise of religion. It is surely essential therefore–surely 'necessary and proper'–in enacting laws for the raising of armies to take account of the First Amendment and to avoid possible violations of the Free Exercise Clause." 38 L.W. at 4497.

Mr. Justice Blackmun, Circuit Justice in *United States v. Levy*, 419 F.2d 360 (8th Cir. 1969) joined in an opinion broadly construing "religious training and belief" under the Selective Service Act. In the case of *In re Weitzman*, F.2d — , 38 L.W. 2549 (8th Cir. 1970) in asserting the Constitutionality of distinguishing between non-religious and religious conscientious objection Justice Blackmun emphasized:

> "The religious training and belief connection with conscientious objection came into the statute not as an establishment of religion but as a legislative accomodation of religious freedom. In the primary Seeger opinion, Mr. Justice Clark outlined the efforts of colonia , state, and federal governments to ameliorate the plight of persons of various faiths when called to bear arms. 380 U.S. at 169-73. It is fair to say that in the light of history, § 377 (a) is another example of what Mr. Chief Justice Hughes referred to as 'our happy tradition' of avoiding conflicts between belief and governmental necessity. *U.S. v. Macintosh*, 283 U.S. 605, 633-35 (1931.)

Catholic conscientious objection rests precisely upon the ground emphasized by the Supreme Court, to wit, religious belief that conscience in representing God, has more right to be obeyed than any law contrary to conscience:

> "Since the right to command is required by the moral order and has its source in God, if follows that, if civil authorities legislate for or allow anything that is contrary to that order and therefore contrary to the will of God, neither the laws made nor the authorization granted can be binding on the consciences of the citizens, since God has more right to be obeyed than men." (Pope John XXIII Pacem in Terris, para. 51, April 11, 1963).

In view of the virtually uniform history of recognition by Congress and by the Supreme Court of religious objection to military service, so carefully outlined by Solicitor General Cox in his brief in *Seeger* and by Solicitor General Griswold

in his brief in *Welsh*, it is curious to find the Solicitor General asserting in the present case and in *United States v. McFadden*, No. 422, October Term, 1970, that Congress in section 6(j) of the Selective Service Act somehow regarded the Catholic's duty of obedience to God as of an inferior order to the duty of obedience to God of members of the traditional pacifist sects. Because of the statement of Catholic doctrine the Solicitor General contends that the Catholic conscientious objector should be subjected to disability from discharge if in the Army or to fine and imprisonment if the Catholic objector refuses induction pursuant to conscience.

The two reeds relied upon by the Solicitor General in the present cases upon examination prove to be very frail indeed. The first reed is the 1943 opinion of the Second Circuit in *United States v. Kauten*, 133 F.2d 703. The Solicitor General's brief in *Seeger* declared that:

> "The Second Circuit, in *United States v. Kauten*, 133 F.2d 703, misconstrued the reason for the abandonment of the requirement of membership in an historic peace church . . . .
>
> ". . . *Berman v. United States* [distinguished] between a conscientious social belief . . . and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one.' "
>
> "Both the *Berman* and *Kauten* decisions were before Congress when the present statute was adopted in 1948. Congress signified that Berman constituted the correct interpretation of its views by adopting the definition of 'religious training and belief' which the Ninth Circuit had borrowed from *Macintosh* . . ." (*Seeger* brief p. 70; *Welsh* appendix 55A).

For purposes of the present argument, the Solicitor General seeks to rehabilitate *Kauten* and relies upon an entirely gratuitous dictum in that case that the words "in any form" modified "war" rather than "participation" in section 6(j)

and that Congress intended to discriminate against religious objectors whose religion prohibited participation in any form only in unjust wars, but not all wars.

In point of fact, the defendant in *Kauten* was opposed to all war. The holding of *Kauten* is that political, as opposed to religious objection, is not ground for exemption:

> "Though the registrant may have been entirely sincere in the ideas he expressed, his objections to reporting for induction were based on philosophical and political considerations applicable to this war rather than on 'religious training and belief.' * * * We are not convinced . . . that registrant did not report for induction because of a compelling voice of conscience, which we should regard as a religious impulse . . . ." 133 F.2d at 707-708.
>
> "The Registrant makes it quite clear that his religious training and belief is not the basis of his present opposition to war.
>
> "There is no doubt that the Registrant is sincerely opposed to war but this belief emanates from personal philosophical conceptions arising out of his nature and temperament, and which is to some extent, political." 133 F.2d at 707, footnote 2.

In addition to deciding the case before the court, however, the *Kauten* opinion continued to express an opinion, unjustified in theology, contrary to Chief Justice Hughes in *Macintosh*:

> "In order to avail himself of his privilege a registrant must establish that his objection to participation in war is due to 'religious training and belief.' It must *ex vi termini* be a general scruple against 'participation in war in any form' and not merely an objection to participation in this particular war. * * *
>
> "There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any cir-

> cumstances. The latter and not the former, may be the basis of exemption under the Act."

The court continues:

> "The former is *usually* a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has been thought a religious impulse." 133 F.2d at 708 [emphasis added]

Theologically, any individual is free to adopt views of the Second Circuit on the one hand that just war objectors are not acting pursuant to religious training and belief, or the teaching of Aquinas, Pope John XXIII, Pope Paul VI and Vatican II on the other hand than Catholics acting upon the Catholic just war teaching do indeed have a duty to God to obey conscience.

Legally, however, the *Kauten* dictum found favor neither with the Supreme Court nor with Congress.

The government has not yet explained how dictum in the Second Circuit in 1943 can overcome the square holding of the Supreme Court in *Sicurella* twelve years later:

> "The test is not whether the registrant is opposed to all war, but whether he is opposed on religious grounds to *participation* in war." 348 U.S. 385 at 388 (1955).

In *Sicurella v. United States,* 348 U.S. at 385, 388 (1955) the defendant was denied classification as a conscientious objector on the recommendation of the Department of Justice:

> " 'While the registrant may be sincere in the beliefs he has expressed, he has, however failed to establish that he is opposed to war in any form. As indicated by the statements on his SSS Form No. 150, registrant will fight under some circumstances, namely in defense of his ministry, Kingdom interests, and in defense of his fellow brethren.' "

The Supreme Court dismissed the Department of Justice construction of the Act with the severe comment:

> "Granting that these articles picture the Jehovah's Witnesses as anti-pacifists extolling the ancient wars of the Israelites and ready to engage in a 'theocratic war' if Jehovah so commands them, and granting that the Jehovah's Witnesses will fight at Armageddon, we do not feel this is enough. The test is not whether the registrant is opposed to all war, but whether he is opposed on religious grounds, to *participation* in war. [Emphasis in original.] As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no such command since Biblical times and their theology does not appear to contemplate one in the future." 348 U.S. at 390-391.

Catholics, like Jehovah's Witnesses, follow God's commands over those of man; and Catholics as set out in Negre's application for discharge explicitly characterize conscience as representing the voice of God. If participation in war violates the Catholic's conscience, Catholic doctrine is clear that the individual Catholic has a duty to comply with his own conscience and to refuse military service.

Petitioner in this case is no more required to become a Jehovah's Witness to qualify for exemption from military service than he is required to become a Quaker: The First Amendment affords Petitioner equal protection in the exercise of his religious belief when–in refusing military service which would violate conscience–the Catholic's conduct is the same as that of the Jehovah's Witness or the Quaker's.

The Ninth Circuit in 1954 rejected the error now urged by the government upon this court. In *Shepherd v. United States*, 217 F.2d 942 (9th Cir. 1954) the registrant was granted exemption from military service despite his statement:

> "I am not a pacifist because when God commands me to fight, I will. I will fight to defend my

> ministry and my brethren, to do the will of my father who is in heaven." (Matt. 12:50). 217 F.2d 942 at 944 fn. 2.

The court followed *Hinkle v. United States*, 216 F.2d 8 (9th Cir. 1954) holding that belief in self defense or the righteousness of theocratic wars did not necessarily negative conscientious objection.

Taffs v. United States, 208 F.2d 329 at 331 (8th Cir. 1953) cert. denied 347 U.S. 947 (1954) held:

> "Whether a certain war is theocratic or not is a matter of religious belief into which we are forbidden to delve. Appellant's positive and uncontradicted testimony was that he was conscientiously opposed to participation in war because he regarded his duties to Jehovah as being superior to any duties arising out of human relationships. This testimony not being impeached, the test of the statute was met."

Since the authoritative construction by the Supreme Court in *Sicurella* that the words "in any form" modify "participation" and not "war", Congress has amended Section 6 of the Selective Service Act in 1957, 1958, 1961, 1962, 1963, 1964 and 1967. Upon each reenactment of Section 6(j), Congress retained the same word order involved in *Sicurella*, thus, by implication, ratifying the construction of Section 6(j) in *Sicurella.*

With the other government reed supporting its construction of Section 6(j) to discriminate against Catholics we can be briefer.

United States v. Spiro, 384 F.2d 159 (3rd Cir. 1967) cert. denied 390 U.S. 958 (1968) (Justice Black and Justice Douglas were of the opinion that cert. should be granted) held:

> "Appellant claims that the granting of conscientious objector status to Jehovah Witnesses who will fight only in a theocratic war and the denial of such status to a Catholic who will fight only in a 'just war' violates his federally protected right to religious

> freedom and to equal protection of the law. Both the Selective Service authorities and the District Court found that appellant did not meet the statutory test for granting of conscientious objector status. See 40 U.S.C. App. § 456(j) (1964). We have authority to reverse only if there has been a denial of basic procedural fairness or if the conclusion of the board is without any basis in fact. *Estep v. United States*, 237 U.S. 114 (1946) . . . ."
>
> "After thoroughly reviewing the record we can only conclude that appellant's classification did have a factual basis. Once this conclusion is reached, we are without jurisdiction to delve into the legal and theological implications of appellant's beliefs." 384 F.2d at 160-161.

If *Spiro* means that the words "in any form" modify "war", then it is inconsistent with *Sicurella* and in error.

United States v. Curry, 410 F.2d 1297 (1st Cir. 1969) cites *Spiro* and *Sicurella* but does not even attempt to reconcile the inconsistency between them.

If *Spiro* simply reads section 10(b) (3) and *Estep* literally, that the findings of the Selective Service System are final even if based upon a misinterpretation of the Selective Service Act or a violation of the Constitution, then *Spiro* is wrong under *Ostereich v. Selective Service*, 393 U.S. 233 (1968); *McKart v. United States*, 395 U.S. 185(1969); and *Gutknecht v. United States*, 396 U.S. 295 (1970). Each of the Supreme Court cases upsets a finding of the Selective Service System well sustained by the evidence because the System applied an illegal or erroneous standard. Indeed, for a court to impose severe punishment under an unconstitutional statute or one improperly construed would be a conspicuous denial of due process, in violation of the constitution which the courts are sworn to uphold. Cf. *Crowell v. Benson*, 285 U.S. 22 (1932); *Goldberg v. Kelly*, 25 L.Ed. 2d 287 (1970); *Yakus v. United States*, 321 U.S. 414 (1944).

For the reasons stated, the construction of Section 6(j) of the Selective Service Act proposed by the government to

discriminate against Catholics upon account of the statement of the Catholic religious doctrine is unsound and should be rejected. On the contrary, Section 6(j) should be construed to afford Catholics refusing military service obedient to conscience discharge from military service.

CONCLUSION

For the reasons stated, Section 6(j) and the corresponding Army Regulation should be declared unconstitutional if they discriminate against Catholics prohibited by conscience formed under Catholic religious training and belief from participating in military service.

In the alternative, Section 6(j) and the Army regulation should be construed to accord equal treatment to Catholic conscientious objectors as to members of traditional pacifist sects, and Negre should be discharged.

Dated: September 13, 1970.

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APPENDIX

Pertinent Provisions of the Constitution, Statutes and Administrative Regulations

The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

The Fifth Amendment provides:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

Section 6(j) of the Military Selective Service Act of 1967, 50 U.S.C. App. § 456(j) provides in pertinent part:

> "(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological or philosophical views, or a merely personal moral code."

Department of Defense Directive 1300.6 dated May 10, 1968 provides in pertinent part:

> "IV. POLICY
>
> A. *National Policy.* The fact of conscientious objection does not exempt men from the draft. However, the Congress, as indicated by provisions of P.L. 90-40 (reference (c)) and related statutes, has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces and accordingly has provided that a person having bona fide religious objection to participation in war in any form (1-0 classification) shall not be inducted into the Armed Forces but will be required to serve his country for the same period of time in civilian work contributing to the

maintenance of national health, safety, or interest under a civilian work program administered by Selective Service.

B. *DoD Policy.* Consistent with this national policy, bona fide conscientious objection as set forth in this Directive by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable. Objection to a particular war will not be recognized."

Army Regulation 635-20 provides in pertinent part:

"3. *Policy.* a. Consideration will be given to to requests for separation based on bona fide conscientious objection to participation in war, in any form, when such objection develops subsequent to entry into the active military service."

* * *

"Requests for discharge after entering military service will not be accepted when–

(1) Based solely on conscientious objection which existed, but which was not claimed prior to induction, enlistment, or entry on active duty or active duty for training.

(2) Based solely on conscientious objection claimed and denied by the Selective Service System prior to induction.

(3) Based on essentially political, sociological, or philosophical views, or on a merely personal moral code.

(4) Based on objection to a particular war."